No. 13,020

IN THE

United States Court of Appeals

For the Ninth Circuit

LEONA SIMPSON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

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STATEMENT OF PLEADINGS.

Upon a plea of not guilty and a waiver of prosecution by indictment (T.R. 4), appellant was tried by jury in the District Court for the District of Alaska, Fourth Division, upon an information (T.R. 3) charging her with the felonious possession and control, within said Division, of a narcotic drug contrary to the provisions of Sections 40-3-2 and 40-3-20 of the Alaska Compiled Laws, Annotated, 1949. Jurisdiction in said District Court is vested by Title 48, U. S. Code, sec. 101 (48 U.S.C.A. sec. 101).

On the 16th day of May, 1951, the jury returned a verdict that the defendant was "guilty of attempting

to commit the crime set forth in the information * * *'' (T.R. 5). Successive motions by appellant for acquittal and, in the alternative for a new trial and for a new trial on the grounds of newly-discovered evidence, were denied by the Court below (T.R. 6-9). From the judgment of said Court entered on the 11th day of June, 1951 (T.R. 11-12), and its orders denying the above-stated motions, appellant appealed to this Court by notice duly filed on said 11th day of June, 1951 (T.R. 12-13).

This Court has jurisdiction to entertain this appeal by virtue of the authority conferred on it by Title 28, United States Code, Sections 41 and 1291.

ABSTRACT OF CASE.

As previously stated, appellant was convicted of an attempt (T.R. 5) to commit the crime of felonious possession and control of a narcotic drug as charged by the information (T.R. 3). It was appellant's contention at the trial of the cause and is appellant's contention on this appeal, that the information did not charge a crime for the attempted commission of which appellant could be tried and punished under Territorial Law. Upon this ground, appellant moved for a directed verdict of acquittal at the close of the evidence (T.R. 93), excepted to the trial Court's instruction to the jury on the general law of attempt (T.R. 105; Instruction 3 (a), T.R. 96), and moved for a judgment of acquittal and, in the alternative, for a

new trial after verdict (T.R. 6). In her alternative motion for a new trial, appellant sought reconsideration of the rulings of the Court upon her motion for a directed verdict of acquittal and exception to the Court's instruction. In every instance, the ruling of the trial Court was adverse and each of said rulings was assigned as error in the statement of points filed in this Court. (Statement of Points, Nos. 4, 5 and 7, T.R. 108-109).

As additional claimed error, appellant presents for review by this Court the propriety of certain evidentiary rulings made by the Court below.

In seeking to prove the charge stated in the information, the Government presented evidence which, if believed, showed that:

(1) A package containing a narcotic drug was consigned by Pan American carrier to a Mrs. Juanita Pearson, Fairbanks, Alaska.

(2) That, prior to delivery to the named consignee, the package was intercepted by a United States Treasury Agent at the Pan American Freight Office at Fairbanks, Alaska.

(3) That the appellant, Leona Simpson, wrote and signed the name of the consignee, Mrs. Juanita Pearson, to a note or "letter of authority" which she delivered to a cab driver so that he might pick up the package in question.

The error claimed is that the trial Court permitted secondary evidence as to the nature and contents of

the note over appellant's objections, without first requiring an identification of the note or a legally sufficient explanation of its non-production. The trial Court's action in denying appellant's objection to such secondary evidence was assigned as error in this Court (Statement of Points, No. 1, T.R. 108).

SPECIFICATION OF ERRORS.

1. The trial Court erred in denying appellant's motion for a directed verdict of acquittal at the close of the evidence (T.R. 93, 94), in overruling appellant's exception to the trial Court's instruction on the law of attempt, in denying appellant's motion for a judgment of acquittal (T.R. 6, 7) after verdict and denying appellant's alternative motion for a new trial (T.R. 6, 7) insofar as said alternative motion was based on the trial Court's refusal to direct a verdict and sustain appellant's exception.

The instruction complained of reads in full, as follows:

> "The Law of Alaska provides that if any person attempts to commit a crime and in such attempt does an act toward the commission of such crime but fails or is prevented or intercepted in the perpetration therof, such person, if proven guilty of such attempt beyond a reasonable doubt, shall be punished as provided by law." (Instruction 3(a), T.R. 96).

In excepting to this instruction, the ground stated by appellant was:

> "* * * upon the ground as to an attempt to commit the crime charged in the Information, upon the grounds there was no attempt alleged in the Information whereas the Law relating to the unlawful use and possession of narcotics contains a clause defining attempts to violate the narcotic law and then also, your Honor, I am going to except to * * *".

The trial Court's denial of this exception and its other adverse rulings as previously set out in this specification bring before this Court for appellate review the question of whether or not an information charging felonious possession and control of a narcotic drug states a crime for the attempted commission of which appellant can be tried and convicted under Territorial Law.

2. The Court erred in overruling appellant's objections to the admission of testimony on appellee's direct examination of the witness, Power G. Greer, proceedings relating to which are, as follows:

> "Q. What, if any, indicia of ownership or right or claim to the package was used in order to claim it?
>
> A. The cab driver produced a note written by hand.
>
> Mr. Taylor. If the Court please, I am going to object to any conversation or any testimony about this note unless the note is produced and identified, best evidence rule.

The Court. Objection overruled.

Q. (by Mr. Hepp). I am not sure that I caught all of your answer, Mr. Greer.

A. The cab driver produced a note written in hand.

Q. There—was there a signature on the note?

A. There was.

Q. Do you know what name purported to be——

Mr. Taylor. Just a moment, Mr. Greer. Your Honor, I am going to renew my objection. I think under the best evidence rule, the note itself is the best evidence and this would be under the hearsay rule, your Honor, and I think the absence of it should be certainly explained to the Court, and no further testimony should be made as to this note.

Mr. Hepp. I am glad to come forward with an offer of proof, your Honor.

The Court. Very well, then. Come forward.

(The following proceedings were had out of the presence and hearing of the jury):

Mr. Hepp. I will show with this witness and others—two other witnesses—that the note was misplaced or lost in the residence of the defendant and that if the note is presently possessed by anyone, it would be in the possession of the defendant and that being so, irrevocably lost insofar as it is the power of the prosecution to produce, I believe that secondary evidence of the same is admissible. I will show those things.

The Court. Have you made a demand on the defendant for it?

Mr. Hepp. No, I haven't made a demand.

Mr. Taylor. If they had something in their possession which was material evidence, it either can be construed that it was in favor of the defendant, or they are trying to conceal something. It would be prejudicial to allow them to testify as to the contents of this note since they do not have the note and it was material evidence, and I don't believe, your Honor——

Mr. Hepp. I don't feel so, not with four witnesses that saw the note and the witnesses are excluded, your Honor. I don't think there could be a travesty on justice in this case. We have no reason necessarily to believe that the defendant has this note. As I say, if it is possessed at this time, it would be in the house there because it was there when the search was made by the Treasury Agent and he never left the house with the note. He couldn't find it, but he left——

Mr. Taylor. He testified to the note from the taxi driver, your Honor, at the Pan Am office, and it would be highly prejudicial.

The Court. The objections will be overruled." (T.R. 25-27).

The witness, Power Greer, then testified in substance, that the note, which was presented at the Pan American office by a cab driver named Brazell (T.R. 25), bore the signature of Mrs. Juanita Pearson (T.R. 28). Previous testimony had established that the name Mrs. Juanita Pearson appeared as the addressee of a package containing narcotics, which the witness Greer had intercepted at the Pan American freight office (T.R. 22, 23). Greer then testified that he took cus-

tody of the note and accompanied the cab driver to a residence where appellant was identified as the person who had delivered the note to the cab driver (T.R. 33).

Appellant then renewed her objection:

"Q. What was the conversation, Mr. Greer?

A. After the cab driver had pointed out Leona Simpson as being the party that had given him the note, I had the note in my hand and I showed it to Leona Simpson and I asked her if she had written it. She replied that she had——

Mr. Taylor. Just a moment, your Honor. We are going to object to any further questions about the note unless it—there is some explanation given for its non-admission or marked for identification. Under the best evidence rule, the note itself is the best evidence, your Honor. I don't think he can testify to it unless it is shown where the note is.

The Court. Objection will be overruled." (T.R. 33).

The errors to be considered under this specification relate to the admissibility of secondary evidence as to nature, contents and circumstances surrounding an unproduced writing material to the Government's case. In each ruling set out above, it is submitted the Court erred for reasons which will be discussed in the argument under this specification.

ARGUMENT ON SPECIFICATION NO. 1.

Appellant was convicted of an attempt to feloniously possess and control a narcotic drug. It is appellant's position that such an attempt, if proven, does not constitute a crime under territorial law. Appellant's contention was characterized by the trial Court as "rather unusual" (T.R. 94). For an opportunity to prove the unusual, appellant has taken this appeal.

Since the evidence presented at the trial of the cause did not tend to prove a consummation of the crime charged, the case was submitted to the jury on the theory that appellant might be found guilty of an attempt to commit that crime under Section 65-2-5, ACLA 1949, the material portion of which is set out as follows:

> "That if any person attempts to commit any crime, and in such attempt does any act toward the commission of such crime, but fails, or is prevented or intercepted in the perpetration thereof, when no other provision is made by Law for the punishment of such attempt, upon conviction thereof, shall be punished as follows: * * *"

This "general attempts section" had its origin as Section 192 of the Act of Congress of March 3, 1899, c. 429 (30 Stat. 1253), hereafter referred to as the Alaska Criminal Code, which Act established the "penal and criminal laws of the United States of America and the procedure thereunder relating to the District of Alaska".[1]

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[1]The enacting clause of Chapter 429 reads as follows: "Be it enacted by the Senate and the House of Representatives of the

By new legislation not amendatory to said Alaska Criminal Code, the Uniform Narcotic Drug Act[2] was enacted into law by the 1943 session of the Territorial Legislature (Sess. Laws of Alaska, 1943, Chapter 6, Secs. 1-26, pp. 47-62.—Secs. 40-3-1 to 40-3-23, ACLA 1949).

Upon Section Two of this Act (Sec. 40-3-2, ACLA 1949), which provides in full as follows:

> "It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this Act",

appellee based its information charging appellant with the felonious possession and control of a narcotic drug (T.R. 3).

From the foregoing analysis, the question to be determined by this Court may be stated as follows: Can appellant's conviction be sustained where that conviction necessarily rests on the applicability of the "general attempts section" as set out in the Alaska Criminal Code enacted by the Congress of the United States for the District of Alaska, to a crime defined and created by the Territorial Legislature in an Act which is not amendatory to that Criminal Code?

United States of America in Congress assembled, that the Penal and Criminal laws of the United States of America and the procedure thereunder relating to the District of Alaska, shall be as follows:"

[2]Section 25 of the Act provides: "This Act may be cited as the Uniform Narcotics Drug Act."

Congress, of course, intended that the "general attempts section" apply only to those crimes set out in the Alaska Criminal Code. At the time of the code's enactment no legislative body had been ordained for Alaska with power to define crimes and provide for their punishment.[3] Assuming that Congress had in mind the eventual admission of Alaska to Territorial status and the creation of a territorial legislature to be vested with such power, it is still apparent that Congress intended to confine the operation of the section in controversy to crimes contained in that code. Such intent is evident from Section 2 of that code, which provides as follows:

> "That the crimes and offenses defined in this Act, committed within the District of Alaska, shall be punished as herein provided." (Sec. 65-1-2 ACLA 1949).

"The crimes and offenses defined in this Act" are those crimes contained in the Alaska Criminal Code as enacted by Congress.[4] Since the "general attempts section" is a part of that Code and since one of its functions is to prescribe punishment, it is obvious that the criminal attempts contemplated by that section are attempts to commit the substantive crimes and offenses defined in the code.

Of course, legislation couched in general terms, as is the "general attempts section", may be progressive

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[3]The creation of a Territorial Legislature was not permitted until August 24, 1912. 37 Stat. 512.

[4]The Act created a comprehensive criminal code defining some 174 substantive crimes.

in application or operation. Such progressive application would have resulted had Congress elected to amend the code by defining a new crime or crimes. By virtue of the Organic Act (37 Stat. 512, approved August 24, 1912), the same avenue of amendment was open to the Territorial Legislature. Section 3 of that Act provides, in part, as follows:

> "* * * that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the Legislature" (Sec. 2-1-1, ACLA 1949).

But in enacting the Uniform Narcotics Drug Act, the Territorial Legislature did not choose to amend the Alaska Criminal Code by incorporation of that Act. Since that code has not been repealed by Congress or by the Territorial Legislature, it is still an Act of Congress in "full force and effect" within the Territory of Alaska; and, the incontrovertible intent to be deduced from its express terms is that the criminal attempts proscribed are attempts to commit the crimes contained in that Act. The progressive application of the "general attempts section" contemplated at the time of its enactment was to crimes newly defined by congressional amendment of the code. The passage of the Organic Act, supra, broadened the intended scope of progressive application to cover crimes newly defined by territorial amendment of that code. But nowhere in that code or elsewhere even by indulgence in the most gross fiction can be found any indication of an intent that the "general attempts section"

should be made applicable to original acts defining new crimes.

The intent of the enacting body, in this instance the Congress of the United States, should, of course, be controlling; but even were it thought for a moment that, present intent on the part of the Territorial Legislature, the application of the "general attempts section" could be extended by implication to new crimes defined by the Territorial Legislature without reference to the Alaska Criminal Code, such a bit of legal legerdemain would avail appellee nothing in the instant case.

Aside from the inference which may be drawn as to the nonexistence of such intent from the failure of the Territorial Legislature to incorporate the Uniform Narcotics Drug Act in the Alaska Criminal Code by amendment, there is still other evidence that the said Legislature did not contemplate any such offense as attempted felonious possession and control of a narcotic drug.

The Uniform Narcotic Drug Act as indicated in the title[5] is comprehensive legislation designed to regulate and control the manufacture, possession, sale, prescription, administration, dispensation and compounding of narcotic drugs.

Uniformity of decision and identity of statute among the various jurisdictions constituting the pri-

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[5]An Act to regular (sic) and control the manufacture, possession, sale, prescription, administering, dispensing and compounding of narcotic drugs, providing penalties for the violation of any provision thereof and repealing Sections 1270, 1271, 1273 and 1275.

mary object of uniform laws[6] when coupled with a consideration of the minute particularity[7] and the broad scope of conduct and activities sought to be regulated by the Uniform Narcotic Drug Act,[8] leads one inevitably to the conclusion that the Legislature intended that Act to occupy the entire regulatory field on the subject of illegal traffic in narcotics.

Such a conclusion was reached by an Oklahoma Appellate Court in *Rich v. State* (1937), 61 Okla. Crim. Rep. 148, 66 P. (2d) 950, in holding that a prior statute on illegal transportation of narcotic drugs was repealed by enactment of the Uniform Narcotic Drug Act although that prior statute was not inconsistent with the terms of said Act.

Said the Oklahoma Court at page 953 of the Pacific Reporter:

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[6]Section 23 of the Act (Sec. 40-3-22 ACLA 1949) reads as follows: "This Act shall be so interpreted and construed as to effectuate its general purpose, to make uniform the laws of those States and Territories which enact it." According to the compilers of American Jurisprudence, the Uniform Narcotic Drug Act was in force in 1940 in at least forty-one States and Territories. 17 *Am. Jur.* 1950 Cumulative Supplement, Sec. 5.1, p. 136. "The principal object of Uniform State Laws is to provide, as far as possible, uniform laws on the subjects involved that would be common to all the States adopting them. They are adopted to remove doubts as to the controlling rules of law on the subjects involved, and are intended to secure not only identity of statute but also uniformity in decision." 50 *Am. Jur.*, Sec. 42, p. 60.

[7]Said the West Virginia Appellate Court in *State v. Hinkle* (1946), 129 W.Va. 393, 41 SE(2d) 107, 109, of the purpose of enacting the Uniform Narcotic Drug Act: "* * * for the purpose of dealing with narcotic drugs in a comprehensive manner and of regulating the subject matter of the statute in specific and minute particulars and in painstaking detail."

[8]For an excellent synoptic discussion of the scope of the Uniform Narcotic Drugs Act, see 17 Am. Jur. 1950 Cum. Supp., Sec. 5.1, p. 136, cited supra, footnote 6.

> "In this connection we think the Defendant is correct. From the statement of the Act set forth it will be readily seen that the Act of May 14, 1935, was a 'Uniform Drug Act'. This is shown by the title of the Act and the different provisions thereof. Sec. 12 of the Act (63 Okl. St. Ann. Sec. 412) regulates the transportation of drugs, and had it been the intention of the Legislature for it to have been an offense to transport narcotic drugs under said Act, they would have undoubtedly so expressed it. Section 2 of said Act (63 Okl. St. Ann. Sec. 402), quoted above, does not provide that it shall be unlawful to transport narcotic drugs and had the Legislature intended to make it an offense they would have evidently incorporated it in Section 2 of said Act. It is evident that the legislature was of the opinion that the Act itself was comprehensive enough to adequately protect the State and its citizens against the illegal traffic of narcotic drugs, and to have a narcotic drug law uniform with the other States of the Nation * * *".

Reasoning by analogy from the holding in the *Rich* case, it is equally apparent in the instant case that had the Territorial Legislature elected to make criminal an attempt to feloniously possess and control a narcotic drug, it could have so provided in Section 2 of the Uniform Act, supra.

Still another avenue to create such a criminal attempt was open to the Territorial Legislature. Section 17 of the Act (Sec. 40-3-17, ACLA 1949) enu-

merates certain unlawful attempts.[9] This enumeration of such attempts without more is an index to legislative intent that they are the only attempts with respect to narcotic drugs, to be punishable at law. The mere inclusion of a catch-all phrase in said section such as "all other attempts to obtain or possess narcotic drugs otherwise than as permitted by this Act" would have been sufficient to create an offense under which a jury might convict this appellant.

As has been previously pointed out, there were several methods by which the Territorial Legislature could have created the substantive offense of an "attempt to feloniously possess and control a narcotic drug". The only logical inference to be drawn from their failure to do so is that they did not intend to create such an offense. Furthermore, to state that they impliedly intended the "general attempts section" of the Alaska Criminal Code to be applicable to Section 2 of the Uniform Narcotic Drug Act, supra, would invite frustration of one of the principal objects of the Act: uniformity of decision. Whether or not an attempt to feloniously possess and control a narcotic drug in violation of Section 2 of the Uniform Narcotic Drug Act would constitute a criminal attempt in a given jurisdiction would turn on many factors, such as, whether or not the Act was a part of the Criminal

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[9] "No person shall obtain or attempt to obtain a narcotic drug, or procure or attempt to procure the administration of a narcotic drug, (a) by fraud, deceit, misrepresentation, or subterfuge; or (b) by the forgery or alteration of a prescription or of any written order; or (c) by the concealment of a material fact; or (d) by the use of a false name or the giving of a false address."

Code, if any, or particular wording of the attempts statute, if any.

As far as appellant can ascertain there has been but one case where a conviction of an attempt to violate Section 2 of the Uniform Act has been before an Appellate Court for review. That case, *State v. Broadnax* (1950), 216 La. 1003, 45 So. (2d) 604, arose in Louisiana. As in the instant case, the Uniform Act was not incorporated in the Criminal Code of Louisiana. In sustaining the conviction, however, the Louisiana Court found ample evidence that the "general attempts section" was intended by the legislators and redactors of the code to be applicable to new crimes created by the Legislature and not forming a part of that code.

This evidence consisted of an express article of that code providing as follows (p. 609 of Opinion as printed in Southern Reporter):

> "A crime is that conduct which is defined as criminal in this Code, or *in other Acts of the Legislature,* or in the Constitution of this State." (Italics by Court),

and the comments printed as footnotes to the "attempt" article (which, under Louisiana law have sanction and may be taken into consideration in determining the construction of a particular article) appearing at page 609 of the Reporter opinion, as follows:

> "Louisiana statutes covered: *Before the adoption of the Criminal Code* Louisiana had no general statute punishing *all attempts* to commit crimes". (Italics by Court).

In the instant case no such evidence of an intent to make the "attempts section" applicable to crimes not contained in the Alaska Criminal Code as enacted by the Congress of the United States, appears from that code. To the contrary, as previously pointed out, the manifest intent of Congress as ascertained from that code is to confine the operation of the "general attempts section" to crimes defined in that code.

It is to be noted that the approach of the Court in the *Broadnax* case was to treat the intent of the redactors of and legislators of the code as controlling, which is, of course, correct. As far as the intent of the Legislature in enacting the Uniform Narcotic Drug Act was concerned, the Louisiana Court's attitude was negative. The Court could find no positive intent that the "Attempts" provision of the Louisiana code be made applicable to violations of Section 2 of the uniform law. When confronted with the argument that the specific attempts enumerated in Section 17 of the Narcotics Act indicated legislative intent not to make the "attempts" article applicable, the Court could only state, at page 410 of the opinion as printed in the Southern Reporter:

> "We do not agree that Section 17 shows any intention of the redactors of the Code to exclude Section 2 of the Uniform Narcotic Drugs Act from the application of Article 27.

The Louisiana Court did not find any intent that the enactors of the Uniform Narcotic Drug Act intended the "attempts" article to be applicable to Sec-

tion 2 of that Act. The uniform nature and the comprehensive scope of the Drugs Act, if it had been considered by the Louisiana Court, would have indicated a positive intention that the "attempts" article not be made applicable. Nor, as has been previously pointed out, does appellant agree with the Louisiana Court in its negation of the intent evidenced by the specific enumeration of offenses in Section 17 of the Uniform Act. We agree rather with the dissenting opinion of Justice Hamiter as expressed in a statement contained in that opinion appearing at p. 610 of the Southern Reporter:

> "The offense of attempted possession of a narcotic drug may be committed only under circumstances (they are not present here) described in Section 17 of the Uniform Narcotic Drugs Act".

Even were it determined by this Court, in the instant case, that the "general attempts section", as contained in the Alaska Criminal Code, is applicable to new crimes created by the Territorial Legislature and not incorporated by amendment in that code, it is appellant's contention that such section would not be applicable to the specific crime involved in this case.

By the express terms of the "general attempts section", it is applicable only "when no other provision is made by law for the punishment of such attempt". The evidence introduced at the trial of this cause, if believed, would establish that appellant authorized a cab-driver, by a note written by her and signed with a name not her own, to pick up a package containing

narcotics at the Pan American Carriers office, which package was addressed with the same name as that signed to the note; that the cab-driver presented the note at the Pan American office but never obtained the package which was then in the possession of and remained in the possession of a United States Treasury agent. If this evidence as summarized tended to prove any offense, it was that of attempting to obtain a narcotic drug by fraud, deceit, misrepresentation, or subterfuge, as proscribed by Section 17 of the Uniform Narcotic Drugs Act, (Sec. 40-3-17, ACLA 1949) which provides as follows:

> "No person shall obtain or attempt to obtain a narcotic drug; or procure or attempt to procure the administration of a narcotic drug, (a) by fraud, deceit, misrepresentation, or subterfuge; or (b) * * *". (Also quoted, supra, footnote 9.)

Subparagraph 7 of the section just quoted, provides as follows:

> "The provisions of this Section shall apply to all transactions relating to narcotic drugs under the provisions of Section 8 of this Act, in the same way as they *apply to transactions under all other Sections.*" (Italics by appellant.)

Section 20 of the Uniform Narcotic Drugs Act (Sec. 40-3-20 ACLA 1949) sets out the penalties to be attached to any violation of the Act.

Since the criminal conduct, if any, which appellee's evidence tends to prove is a violation of Section 17 of the Act, and since punishment for such conduct is

provided for by Section 20 of said Act, it is submitted that there is *another provision at law for the punishment of such attempt,* which makes the "general attempts section" inoperative by its express terms.

Furthermore, by virtue of the italicized language in subparagraph (7) of Section 17, above quoted, legislative intent is expressed that Section 17 shall be applicable to all transactions under the Act, including necessarily Section 2 for the violation of which appellant was tried. Section 17, it is submitted, when read together with Section 2, should make it clear that the only attempts to violate Section 2 which are punishable at law are those attempts provided for in Section 17.

In *Minter v. State* (1942) 75 Okl. Cr. 133, 129 P. (2d) 210, a situation, analogous to that in the instant case, confronted the Oklahoma Appellate Court. Defendant had been indicted for attempted murder under the "general attempts section" of the Oklahoma Code, which is substantially identical with that contained in the Alaska Criminal Code. The evidence induced at the trial of the cause tended to show that defendant was guilty of wilfully mingling poison with food with the intent that the same be taken by a human being to his injury, which conduct was specifically proscribed by another Criminal Statute of Oklahoma.

In holding that the indictment was improperly laid on the "attempts section" and should have been brought under the "Poison Statute", the Court stated at page 212 of the Reporter:

> "In addition to this statutory provision, the latter part of Section 1822, O.S.1931, supra, under which this action is brought, provides: * * * where no provision is made at law for the punishment of such attempt * * *. There was a Statute specifically providing for acts such as were alleged to have been committed by Defendant, and under the plain terms of the provision above quoted, the charge should have been filed under the specific Statute and not under the terms of Section 1822, O.S. 1931."

The additional "statutory provision" referred to provided, in effect, that, where the penal code and any other chapter of the laws of that State made the same act criminal, the other chapter should control. In view of the language just quoted, the Oklahoma Court would have reached the same conclusion without the aid of that "statutory provision".

The result reached in the *Minter* case should be compared with that obtained in the California case of *People v. Marks* (1914) 24 Cal. App. 610, 142 P. 98. In this latter case defendant was charged with pandering and convicted of attempted pandering. Defense counsel contended that the pandering statute (which is not set out in the opinion) contained several sections which embraced the conduct for which defendant was found guilty of an attempt, and which created distinct substantive crimes for which defendant could be convicted. In rejecting defendant's contention, the California Court states at pages 99 and 100 of the opinion as printed in the Reporter:

> "we think that the language of Section 664, '* * * where no provision is made by law for the punishment of such attempts * * *' applies exclusively, and must be confined to 'attempts' designated by statute as such, and does not refer generally to acts done in the attempt to commit the crime, and which, if done without relation to the offense, might be separately punished."

The Oklahoma and California Courts are at odds as to the proper construction to be placed on the statutory phrase "where no provision is made at law for the punishment of such attempt". According to the California Court in the Marks case, *supra,* the "general attempts section" is operative unless there is another statute defining the attempt and providing for its punishment. The California Court does not decide whether such statute must spell out specifically an attempt to commit the particular crime with which a defendant is charged. Left undecided is the result that would be reached were there, as in the instant case, another statute couched in terms of an attempt which would embrace the conduct for which a defendant is found guilty under the "general attempts section".

The Oklahoma Court, giving an unstrained and natural construction to that statutory phrase, decided that the "general attempts section" was inapplicable wherever other provision was made a law for the punishment of the defendant's conduct regardless of whether or not such other provision defined a substantive crime in terms of an attempt. The Oklahoma case, of course, supports appellant's contention

that the specification by Section 17 of the Uniform Narcotic Drugs Act of certain attempts which would embrace appellant's alleged criminal conduct makes inoperative the "general attempts section" because *there is a provision at law for the punishment of such attempt.* The California Court leaves undecided the specific question confronting this Court, but may be considered as authority in support of appellant's position if the statement, "applies exclusively and must be confined to attempts designated by statute as such", as contained in that Court's Opinion, means any attempt, defined as such, and embracing the alleged criminal conduct, regardless of whether or not such attempt is specifically to commit the crime charged.

On the basis of the foregoing authorities and argument, it is submitted that the cause should be reversed and remanded and the trial Court directed to enter a judgment of Acquittal for appellant.

ARGUMENT ON SPECIFICATION NO. 2.

The question here involved actually encompasses three subquestions, each of which must be answered before a determination can be made of whether or not appellant has been prejudiced by the admission of secondary evidence of a certain note, as set out in Specification of Error No. 2.

Those sub-questions may be phrased as follows:

1. Did the Court err admitting evidence of the contents of the note in the first instance without requiring any explanation of its absence?

2. Was the offer to prove loss made by the Government sufficient to justify the conditional admission of secondary evidence?

3. If not, does the record show that a sufficient predicate was established to permit secondary evidence of the note to stand?

The answer to the first sub-question must be in the affirmative. No serious question can be raised that the note was not directly material to the issues. If attempt there was, it rests in the delivery by appellant of this "letter of authority" to the cab driver. As such material evidence, it falls squarely within the best evidence rule. When the witness, Power G. Greer, was asked

> "What, if any, indicia of ownership or right of claim to the package was used in order to claim it?" (T.R. 25),

the Government was seeking testimony as to the contents of the note in question. Only an examination of its contents would show whether or not it was an "indicia of ownership or right of claim to the package." The witness so understood the question, for he answered:

> "The cab driver produced a note written by hand." (T.R. 25.)

With the Government's intention made manifestly certain by this answer, appellant objected on the grounds of the best evidence rule. (T.R. 26.) The trial Court obviously erred in overruling this objection. (T.R. 26.)

As stated in 20 Am. Jur. sec. 403, p. 364:

> "It is an elementary principle of the law of evidence, that the best evidence of which the case in its nature is susceptible, and which is within the power of the party to produce, or is capable of being produced, must always be adduced in proof of every disputed fact. Secondary evidence is never admissible unless it is made manifest that the primary evidence is unavailable, as where it is shown that it has been lost or destroyed, is beyond the jurisdiction of the Court, or is in the hands of the opposite party who, on due notice, fails to produce it. * * *"

Before endeavoring to answer sub-questions 2 and 3, it will be necessary to review the pertinent authorities and consider the facts of this case in light of those authorities.

A general statement of the applicable law is contained in 20 Am. Jur. sec. 441, p. 393, as follows:

> "In order to introduce secondary evidence of an instrument which is claimed to have been lost or destroyed, the proponent of such secondary evidence must show that he has in good faith exhausted, in a reasonable degree, all sources of information and means of discovery, which the nature of the case would naturally suggest, and which were accessible to him. The Court should be fully informed of the facts showing the diligence used in making the search. In many instances, secondary evidence has been excluded because the details were not sufficiently proved. A general statement that diligence has been used or a mere perfunctory showing of some diligence, will not suffice.

"The contents of a lost instrument cannot be proved unless it appears that reasonable search has been made in the place where the document was last known to have been and, if not found there, that inquiry has been made of the person last known to have had its custody. If it is shown to have been in a particular place or in the custody of a particular person, that place should be searched or the person in whose custody it is shown to have been should be produced, or, if he is dead, his successor should be called.

"A reasonable search or one which shows reasonable probability of loss of the instrument is sufficient; it need not appear that every possible search has been made. Of course, no absolute rule can be laid down which will define what search shall be considered as a search prosecuted with reasonable diligence. The degree of diligence which shall be considered necessary, in any case, will depend on the circumstances of the particular case, as, for example, the character and importance of the paper, its value, the purpose for which it is proposed to be used, and the place where a paper of that kind is most likely to be found. In other words, proof of search and proof of loss are always proportionate to the character and value of the papers supposed to be lost."

In *Jernigan v. State* (1887), 81 Ala. 58, 1 So. 72, the following statement of the applicable rule was made:

"In accounting for the absence of a writing, material testimony in the cause, so as to let in secondary evidence of its contents, no universal

> rule can be declared which will be applicable to every case. The testimony is addressed to the presiding Judge, and he pronounces its sufficiency. He must be reasonably convinced that it has been destroyed, is lost, or is beyond the reach of the Court's process. A material inquiry in such cases is whether or not there was a probable motive for withholding the highest and best evidence. Whenever the Court is able to answer this inquiry in the negative, less evidence will satisfy its conscience than if suspicious circumstances attended the transaction. As a rule, there must be a careful search at the place at which it was last known to be, if its place of custody can be traced or remembered. If not, then such search must be made at any and every place where it would likely be found. * * *''

The requirement that predicative proof be more stringent where primary evidence has been lost under suspicious circumstances has been approved by the Michigan Court in *People v. Lange* (1892), 90 Mich. 454, 51 N.W. 534.

That the rule is a variable one with the inquiry or search to be directed to all sources of information and means of discovery which the nature of the case would reasonably suggest, see *Leake v. State* (1921), 149 Ark. 621, 233 S.W. 773.

In light of the foregoing authorities, it is submitted that the answer to sub-question 2, "Was the offer to prove loss, made by the Government, sufficient to justify the conditional admission of secondary evidence?" must be in the negative. Consider-

ing all the statements of the United States Attorney together made in his offer to prove, at pages 26 and 27 of the record, it may be concluded that all that was offered was that the note was lost, that a search was made but the note wasn't found and that four witnesses saw the note. No offer was made to prove the nature and extent of the search or that due diligence was employed in making the search. Nor would the number of witnesses who had seen the note have any effect on the requirements of the rule as to the employment of reasonable diligence in the search for a lost instrument. Secondary evidence as to the contents of a written instrument through the testimony of a dozen witnesses is no substitute for primary evidence and the absence of the primary evidence must be first explained. It is clear therefore that the offer to prove did not measure up to the requirements of due diligence as set out in the quoted authorities and that the Court erred in accepting an insufficient offer to prove and permitting the introduction of such secondary evidence.

A further error should be discussed. Although, concededly, the order of proof is vested in the discretion of the Court, it would appear that there has been an abuse of that discretion in the instant case. The Government gave no explanation, reason or necessity why the usual order of proof could not be followed by requiring predicative evidence of loss before allowing testimony concerning the nature and contents of the note in question. Certainly, requiring such usual order of proof is of assistance to the trial

Court in reaching a sound judicial determination of whether or not a sufficient predicate has been established. The evidence with respect to this predicate is presented at one time, rather than on scattered occasions throughout the proceedings. The attention of the trial Judge can thus be focused on one issue which can determine without hindrance from the diversion present through other issues and evidence.

The answer to the third sub-question must also be in the negative. No sufficient predicate as to loss was ever established by the Government to correct the trial Court's error in the admission of secondary evidence over appellant's objection.

Power G. Greer, a Treasury Agent with twenty years experience, (T.R. 19) testified, on direct examination, with respect to the loss of the note, as follows:

> Q. I would like to ask another question or two, Mr. Greer, concerning this note that you have testified to. Do you know where that note is, Mr. Greer?
>
> A. No, sir; I do not.
>
> Q. When did you last see that note?
>
> A. Last time I saw it was in the home of Leona Simpson when it was folded up and placed under the string that wrapped the package and contained the heroin.
>
> Q. Now, in relation to this—the period of time during which this conversation took place that you have testified to, when did you see that note last in relation to that conversation?
>
> A. Well, it was some few minutes thereafter. I placed the box and the note on the table in the

kitchen or the front room of the home, after I told Leona that she was under arrest and had to come with us. She stated she had to dress, which she did, and we were there approximately thirty minutes.

Q. Are you able to explain to this jury what happened to that note?

A. I have an opinion.

Mr. Taylor. We object to an opinion, your Honor.

Mr. Hepp. I will refuse that answer.

Q. (By Mr. Hepp). Of your own knowledge, can you explain where that note is or what became of it?

A. No, sir.

Q. Did you make a search about your person or other places for that note before you left the premises of Leona Simpson, Mr. Greer?

A. I did, sir.

Q. Did you find it or any trace of it?

A. No, sir.

Q. And you are presently unable to produce that note?

A. No, sir.

Q. Did you understand that question? I say, you are presently unable to produce that note?

A. That's correct. I do not have it. I don't know where it is.

On cross-examination, it was established (T.R. 47) that four persons, in addition to the witness, were present at the residence of appellant when the note was lost. Those persons were, the United States Marshal McRoberts, the cab driver who had called at the Pan American freight office for the package, appellant and a "girl named Betty Austin". The

witness Greer testified, in substance, that he had asked Marshal McRoberts whether or not he had the note and had asked the cab driver whether or not he had seen it, to both of which inquiries he had received a negative reply. He further testified that he had looked for the note in the drawers of a night stand next to the bed but not through the drawers of a dresser in the bedroom. (T.R. 49.)

On direct examination, the United States Marshal McRoberts testified that he did not have the note and in response to a question as to its whereabouts, replied: "No, I don't. Mr. Greer lost it at the time, or mislaid it, or something." (T.R. 62.) On cross-examination, it developed that if any search were made by the Marshal McRoberts, it was for narcotics, and that the witness, Greer, asked him if he had the note when they were ready to leave the premises. (T.R. 66.)

The foregoing review of the record is a statement of the entire evidence presented on the subject of the note's loss. Even aided by the cross-examination of appellant, the Government fell far short of the burden imposed by law of showing that a search for the lost note was made with due diligence. The most that can be inferred from the evidence is that a search was made. Whether the search was thorough or perfunctory, careless or diligent, is not evident from the record. Certainly, the circumstances surrounding the loss of the note would indicate that inquiry should have been addressed to the woman, Betty Austin, who was present at the premises when the note disappeared. But even were this not re-

quired, the details of the search were not sufficiently delineated to enable any judge to find that due diligence was exercised in the search for the note.

Indeed, the loss of the note before the eyes of a Treasury Agent in the company of a United States Marshal is such a suspicious circumstance as should cause a trial court to exact a strict showing of due diligence. The preservation of material evidence by Officers of the United States entrusted with the enforcement of its law is of the gravest importance to the end that those laws be enforced. It is equally important to defendants that such evidence be preserved. If one is to be convicted, he must be convicted by competent and material evidence—the best evidence available. One's freedom should not be made to turn on the accuracy of another's memory where carelessness alone has made testimony from memory necessary. One's credulity must be elastic to accept as fact the loss of a note by a Treasury Agent with twenty years experience in the Department. The inference is ever so subtly present that such loss was convenient. If not convenient in the instant case, may it not be convenient in future cases? If your material, physical evidence is weak, of little probative force or effect, or if its contents are, in some respects, indicative of a defendant's innocence—the remedy is simple: lose it. The gate is then open for the fabrication of non-physical evidence — the testimony of the investigating officer concerning the loss of evidence.

Nor can we be so naive as to imagine that evidence is never fabricated. Overzealous prosecutors, willing

to substitute their judgment for that of law and intolerant of the law's exaction with respect to evidence, have and will fabricate evidence.

Considering the suspicious, almost unbelievable circumstance under which the note disappeared in the instant case, motive may have existed which made the loss convenient. Since the appellant's name was not the same as that appearing on the package containing the narcotics as the consignee, the note may have indicated that appellant was acting as agent of the named consignee. It is certainly significant to note, in this connection, that the Government never asked any witness to testify as to the precise contents of the note from his best recollection. The United States Attorney obtained evidence of its nature without revealing evidence as to its precise contents, by always asking each witness, in effect, whether or not the cab driver presented any indicia of ownership, or claim, or right to the package containing the narcotics. (T.R. 25, 59, 74.)

On the previously cited authorities and upon the record, it is submitted that the cause should be reversed and remanded, with a mandate to the trial Court to order a new trial.

Dated, Fairbanks, Alaska,
December 7, 1951.

Respectfully submitted,
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Receipt of copy of foregoing typewritten brief acknowledged this 29th day of November, 1951.

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